IN THE HIGH COURT OF GUJARAT
AT AHMEDABAD

CRIMINAL APPEAL NO.305 OF 1990

Date of Decision : 23rd NOVEMBER,1995.

THE HON'BLE MR. JUSTICE A. N. DIVECHA
AND
THE HON'BLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of judgment ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any other order made thereunder ?

5. Whether it is to be circulated to the Civil Judge ?

Mr.G.B.Pardiwala, Advocate for the apppellant.
Mr.S.T.Mehta, AGP for the respondent.

CORAM;A.N.DIVECHA & H.R.SHELAT,JJ_
DATE:- 23rd NOVEMBER 1995.

ORAL JUDGMENT;- (Per H.R.Shelat,J.)

1. The present appeal has been filed against the judgment and order dt. 21st March 1990, passed by the then learned Additional Sessions Judge, Kutchchh-Bhuj in Sessions Case No.49 of 1989, whereby the appellant came to be convicted of the offences under Secs. 302 and 394, IPC, and sentenced to life imprisonment for the offence under Sec.302 IPC, and seven years Rigorous Imprisonment and a fine of Rs.1,000/- in default, simple imprisonment for three months more, with regard to the offence under Sec.394 IPC.

2. It is the case of the prosecution that Amthu

Devji Vaghari residing at Anjar, was in the evening on 24th February 1989 ,at his home. At that time, Hawa Vasta his cousin went to him and informed that Lakhibai Jitabhai and Manibai Jivabhai (mother & daughter) were kidnapped on the same day at 11-00 a.m. and were taken out of the village by a Rickshaw. At 16-00 hours on the same day. the appellant had been to the goldsmith namely Khimjibhai for the purpose of selling out the ornaments, Lakhibai and Manibai had worn, but the goldsmith smell a rat and he insisted that some one knowing the appellant, must introduce. The appellant gave the name of Rava Jiva and therefore, he was called by the goldsmith. When Rava Jiva went to the shop of the goldsmith, the appellant ran away leaving the ornaments. Lakhibai and Manibai were missing and no trail was available till then. The complainant also made search, but could not find both the women. At 8-30 p.m., he went to the place of the appellant to inquire. The appellant was then interrogated by Mitha Rava, Dahya Jalam and Shiva who had gone there. The appellant then confessed that he took Lakhibai and Manibai by a Rickshaw to the river Nagor and then both were done away with by giving razor blows. On Anjar Police Station being informed, the complaint was recorded. The Police Officer investigated into the matter. At the conclusion of the investigation, the chargesheet against the appellant came to be filed before the Court of the learned Judicial Magistrate (First Class) at Anjar. The learned Magistrate was not competent to hear and decide the case of the offence under Sec.302 I.P.C. He, therefore, committed the case to the Court of Sessions at Bhuj for hearing and disposal in accordance with law. The learned Sessions Judge thereafter, framed the charge at Ex.1 on 9th February 1990. After knowing about the allegations levelled against him, the appellant pleaded not guilty and claimed to be tried. The prosecution then led necessary evidence so as to establish the charge. Considering rival submissions and evidence on record, the learned Judge came to the conclusion that the charge of the offence under Sec.363 was not established beyond reasonable doubt, but certainly the charge of the offences under Secs. 302 and 394 I.P.C. was established, and for those offences, the learned Judge held the appellant guilty and sentenced him as aforesaid. In the result, the present appeal has been filed before us.

3. Mr. Pardiwala, the learned advocate was appointed to represent the appellant. He submitted that the case was hinging upon the only circumstance namely the deceased and the appellant were seen together last by some of the witnesses but on the basis of that

circumstance being insufficient, the appellant ought not to have been connected with the offence. The learned Judge, however, being allured much of it based his conclusion, not at all consistent with law. His erroneous appreciation of evidence and drawing of the conclusions were required to be corrected paving way to the appellant's acquittal uptill now throttled by erroneous approach. Mr. S.T.Mehta, the learned APP on behalf of the prosecution supported the judgment and order of the lower court. According to him the circumstances pointed out cannot be hooted out lightly; it was energized by the materials on record justifying wharfing of the appellant. There was no incongruity in evidence. There was also no inherent improbability justifying to disconcert the lower courts' judgment & order, and let off the appellant, unpunished. He has also appealed to see that the courts of law do not become the instrument in adding to the anarchy, but real instrument to further justice without being impressed by gadgets woven in the arguments.

4. First of all let us make it clear that neither gadget of any one, nor demagogy or declamation or isms or ideology, or commiserative submission will influence or wring the courts, but the case or submission strictly meritorious as well as in consonance with law and law alone will find favour.

5. Mohmad Suleman is plying his Rickshaw. He is examined at Ex.10. It transpires from his evidence that his Rickshaw was hired by the appellant from Bhidnaka at 10-30 a.m. Along with the appellant, two women belonging to Vaghari community were there. By his Rickshaw, he carried all the three persons to Nagor river and left them there. On the next day, when news of the incident was published in a local daily, he was called by the Police. On being interrogated he apprised the Police how his rickshaw was hired, who hired, what fare he charged and where he left them, which facts support the prosecution. What can, therefore, be said on the basis of his evidence is that both the deceased and the appellant were seen together shortly before the incident happened. Whether this circumstance simpliciter is sufficient in law to connect the appellant with the guilt is hotly contested before us, alike tug-of-war.

6. We are of the view that, if the deceased and the accused are seen together last by some of the witnesses, that circumstance alone will not be sufficient to connect the accused with the guilt, but if other cogent

circumstances free from doubt on record positively indicate the guilt of the accused, the circumstance of seeing the accused and the deceased together last shortly before the incident can well be considered to be the additional factor attributing guilt to the accused; i.e. will certainly lend assurance about his guilt. In this case, there are other circumstances free from doubt and cogent in nature connecting the appellant with the guilt, without leaving any reason indicating his innocence.

7. Khimji Odhavji-the Goldsmith is examined at Ex.21. What can be deduced from his evidence is that the appellant had been to his shop on the date of the incident at 16-00 hrs. The appellant had gone to him to sell three silver Hansdies (something like heavy and thick necklet) and two silver Kadlas (something like thick and heavy bracelet) ordinarily worn by females in that area. He smelt a rat. He showed willingness to purchase only on satisfactory introduction by a person known to him. The appellant then gave names of Valji Kachara, Dahiben and Ravji Koli mentioning that those three dealing in vegetable were knowing him and would be available in the Bazaar. Chandrakant the son of the goldsmith was asked to call any of the three named. All the three being called went to the shop of this witness. They were then appraised about the fact. On the ornaments, the name of some one other than the appellant was found. Realizing that his guilt would come to surface, the appellant bolted away leaving all the ornaments there. He (goldsmith) then handed over the ornaments to all those three jointly. Along with this evidence, the evidence of Dahiben and Arvind Shivji has to be considered. Dahiben (Ex.12) has supported the goldsmith. She receiving the call went to the shop of the goldsmith, where she saw the appellant. When the ornaments were shown to her the appellant bolted away without ornaments i.e. three Hansdies and two Kadlas, which were then handed over to Ravji Koli. Arvindbhai (Ex.13) falling on the line of Dahiben further states that on the ornaments the name of "Arjan Jita" was found written. He, however, did not mention about the appellant and to that extent, he has not supported the prosecution. It seems Arvind Shivji for reasons best known to him wanted to please both and so shrewdly he made the statement declutching and disjointing the appellant. A perusal of the evidence of the above referred witnesses leaving no doubt in our minds shows that not to get into the hot water and have a safer-side, Arvindbhai made his statement falling short of connecting the appellant with the guilt. On the basis of the evidence of Dahiben and the goldsmith, we concur with the

learned Judge who rightly reached the conclusion that the appellant's conduct of leaving the shop without the ornaments after Dahiben and Arvind reached the shop, was revealing his guilty conscience.

8. Such evidence also shows that soon after the incident, the appellant was found in possession of the ornaments worn by both the deceased, because "Arjan Jita" the name found on the ornaments was the name of one of the members of their family. On 24th February 1989, after 11-00 a.m. at any time, the incident happened, and at 16-00 hrs. on the same day, the appellant was found in possession of the ornaments put on by the deceased. The appellant has not explained, how soon after the incident, he came into the possession of those ornaments put on by the deceased. When that is so, it is a circumstance on the basis of which it can reasonably be assumed that either he is a thief or a receiver of the stolen property. When this circumstance is considered, alongwith that of both having been seen together shortly before the incident, it can reasonably be believed that he has also committed the murder of both Lakhiben and Maniben.

9. It is pertinent to note that the blood group of Lakhiben was 'B', while the blood group of Maniben was 'O'.The Police when seized the ornaments, found blood stains thereon. After analysis the Chemical Analyzer has opined in his report (Ex.14) that on the Hansadies, human blood having 'B' Group was found, and on the Kadlas, human blood having 'O' Group was found. When such group of blood similar to that of the deceased is found on the ornaments put on by the deceased and the accused came into possession of those ornaments soon after the incident,the circumstance of last seeing the appellant with the deceased assumes importance.

10. After the appellant was arrested, his house was searched and from his house a bag containing clothes were found. The panchnama thereof was drawn. Jayarampuri Devpuri one of the panchas whose evidence has been recorded at Ex.22 has supported the case of the search fully.The Panchnama is produced at Ex.23. On the clothes of the appellant, blood stains were seen. The clothes were also sent to the Chemical Analyzer. In the report (Ex.38), it is opined by the Chemical Analyzer that the blood group of blood stains on the pant and the shirt of the appellant was "B" Group. The Appellant has also not explained how such blood stains came to be found on his clothes. The prosecution gets strong corroboration by such circumstance.

11. Before Amthu (Ex.8) and Dahya Vasta (Ex.9), the appellant made statements confessing his guilt saying that he had killed both Lakhiben and Maniben. Of course the other part of the prosecution's story is not supported but his say about confessional statements having been made by the appellant is not assailed in the cross examination, and is not firmly shaken. Simply to suggest that the appellant did not make such statement is not enough. The evidence about such confessional statement cannot be overlooked.

12. We think it proper to refer to the decision of Supreme Court in Sunderlal Versus The State of Madhya Pradesh, AIR 1954 SC 28 wherein a likewise incident happened and the accused was held guilty. In that case also the accused was found in possession of ornaments put on by the deceased and the accused had gone to the shop of goldsmith to sell the ornaments. The decision can well be pressed into the services of prosecution. Thus considering the circumstances that the appellant came into the possession of the deceased's ornaments soon after the incident,his going to the goldsmith's shop to sell the same, and going out therefrom leaving the ornaments, his confessional statement made voluntarily, and the same blood group having been found on the ornaments and the appellant's clothes, the irresistible conclusion that can be drawn is that the appellant is the wrongdoer. Coupled with these circumstances, the fact of seeing the appellant last with the deceased sometimes before the incident assumes importance and it lends additional assistance in holding the appellant guilty. The learned Judge below was, therefore, right in convicting and sentencing the appellant as aforesaid.

13. Facing with such situation, Mr. Pardiwala, learned advocate, who has laboured much submitted relying on four decisions that the circumstances on which we place reliance would not be sufficient to hold the appellant guilty. What happened in that case of Gautam Maroti Umale Versus State of Maharashtra, 1994 SCC (Cri) 1721 was that at the instance of the accused, ornaments belonging to the deceased were recovered. It was held that the accused could not only be connected with the murder; at the most, he could be connected with the offence of possessing the stolen property. On 26/11/1984,the incident had happened, and on 28/11/1984 after the accused in that case was arrested, at his instance, silver Kadalas and two pairs of rings were recovered. The Supreme Court found it difficult to accept the case of the prosecution holding that the mere

fact of recovery would not connect the accused with the murder. The Supreme Court found that the evidence about recovery was not wholly convincing, and so the accused was not held guilty of murder. Here in this case, the circumstances are stronger and cannot be placed at par with those emerging on record in the case before the Supreme Court. In the case on hand the appellant is not only found in possession of mere ornaments put on by the deceased, but he is found in possession thereof within few hours of the incident, and that too with blood stains having the same blood group as that of the deceased, with no explanation about the same. Such and other above stated circumstances, absent in the case before the Supreme Court are making this case distinct. When such distinguishing circumstances are there on record, the citation will not govern the case on hand. In other words, in the case before the Supreme Court the circumstances relied upon were capable of double constructions and were not wholly favourable to the prosecution, but the above stated circumstancesd in the present case leaving no room to doubt or any other possibility point the guilt of the appellant. The appellant, therefore, gains no ground to stand upon. Another decision which was cited is of a case of Gulab Singh Versus State of U.P. 1994 SCC (Criminal Cases) 1783, wherein it is held that the circumstance last seen together will not be sufficient to conclusively establish the guilt of the accused, but recovery of rings of the deceased from the accused in that case, eight days after the murder in the absence of full explanation from the accused in that case was found sufficient to hold the accused guilty of the offence under Sec.411 IPC. In that case, the accused and the deceased were found together from 5-00 p.m. to 8-30 p.m., and were last seen at 8-00 or 8-30 p.m. After 3 days the dead body was found and the ring was found from the accused after a week when the accused was arrested. The Supreme Court held that the chain was not complete; and although the circumstances threw strong doubt, it could not take place of proof. The accused was hence convicted of the offence u/s 411 I.P.C In that case on the ring blood stains were not found but here in this case they are found. Further the above stated circumstances eloquently in the case on hand rope in the accused-appellant and such circumstances were absent in the case before the Supreme Court. Here, therefore, the chain is complete. Owing to such distinguishing factors the decision will not apply.

14. The prosecution in this case does not rely upon the circumstance viz. last seen together alone. It relied upon other cogent circumstance hereinabove we have

discussed, and therefore, the decision in the case of Jaharlal Das Versus State of Orissa, AIR 1991 SC 1388 will not apply. In the case before the Supreme Court, last seen together circumstance was not established beyond doubt. Further recovery of the dead body at the instance of the accused was also not proved. Medical evidence did not support intercourse. In the case on hand no such infirmity is found, and so the appellant cannot gain by citing the decision.

15. We agree, if extra judicial confession is made by the accused, it is an isolated weak piece of evidence. It can be relied upon only if it is found voluntary, true and free from doubt.. In this case, evidence of Amtha Devji, and Dahya Vasta (Exhs.8 and 9) for the reasons stated hereinabove, shows that the confessional statement made by the appellant is certainly voluntary, true, and credible. That confessional statement coupled with the above discussed circumstances support the case of the prosecution. When that is the distinguishable feature, the decision of this court, rendered in the case of Ukabhai Becharbhai versus State of Gujarat, 1984 G.L.H. 66 is not applicable and cannot help the appellant.

16. Mr.Pardiwala took us to the evidence of Mohmad recorded at Ex.10 who has supported the case of the prosecution stating that by his Rickshaw, he carried the deceased and the appellant, took them upto the river Nagor and left there. Mr.Pardiwala questioned the memory of this witness submitting that one would not remember after a period of one year who engaged his Rickshaw in past, and how, and what fare was charged. It may be stated that some are bestowed with good memory.Further one may remember a particular incident though he may not remember others because it depends how a particular incident strikes his mind and is carved in it, or how he attaches importance. Here in this case, the incident must have carved in his mind as on the third day news about murder of two women near the river Nagor was published in a local daily. He had carried those two in his rickshaw. In his life murder of his passengers was the first event. Naturally, he would especially remember the same rather than other usual incidents to which no importance would be given. Further his statement about his memory made in his chief examination is not assailed in his cross-examination. The appellant having thus accepted the memory power, it is not open to now question the same.There is therefore no reason to doubt the testimony of Mohmad Suleman recorded at Ex.10. On no other grounds, submissions are made. For the reasons stated hereinabove, the appeal is devoid of merits and

deserves to be dismissed.

17. In the result,the appeal fails and is hereby dismissed. The judgment and order convicting and sentencing the appellant passed by the lower court are maintained.
